Nos. 186, 187

IN THE

Supreme Court of the United States

October Term, 1951

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee, *Petitioner*,

v.

ROANE-ANDERSON COMPANY, ET AL., *Respondents*.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee, *Petitioner*,

v.

CARBIDE AND CARBON CHEMICALS CORPORATION, ET AL., *Respondents*.

MEMORANDUM ON BEHALF OF RESPONDENTS, CARBIDE AND CARBON CHEMICALS CORPORATION, DIAMOND COAL MINING COMPANY, ROANE-ANDERSON COMPANY, WILSON-WEESNER-WILKINSON COMPANY

S. FRANK FOWLER,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CASES CITED.

STATUTES CITED.

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MEMORANDUM ON BEHALF OF RESPONDENTS

STATEMENT OF THE CASES

The Respondents herein filed four original bills in the Chancery Court (Part I) of Davidson County, Tennessee,

against the Petitioner herein, to recover certain moneys paid to the Petitioner and claimed by him to be due as taxes under the Tennessee Retailers' Sales Tax Act.

The first case was filed by Carbide & Carbon Chemicals Corporation (hereinafter referred to as Carbide), a cost-type contractor with the Atomic Energy Commission for the purpose of testing the *use* tax (that is, the tax invoked where Carbide buys from an out-of-state vendor) and was brought to recover use taxes theretofore paid to Petitioner. This was Number 65014 in the court below, and is No. 187 before this Court.

The second case was brought by Roane-Anderson Company (hereinafter referred to as Roane-Anderson), a cost-type contractor with the Atomic Energy Commission of the United States, likewise to test the use tax. This was Number 65015 in the court below, and is No. 186 before this Court.

The third case was brought by Diamond Coal Mining Company and Carbide, to test the *sales* tax, being Number 65163 in the court below, and is No. 187 before this Court.

The last case was brought by Wilson-Weesner-Wilkinson Company and Roane-Anderson, likewise to test the sales tax, and was Number 65164 in the court below, and is No. 186 before this Court.

Hereafter references to the Transcript of Record in Case No. 187 are indicated as "Carb. R." followed by the page number. Those to the Transcript of Record in No. 186 are indicated as "R-A R." followed by the page number.

STATEMENT OF FACTS

While the petitions filed by the Petitioner in these cases set forth a brief summary of the facts, the Respondents present the following statement of facts to the Court. To the extent this statement of facts may be at variance with the findings by the Chancellor below (Carb. R. 67-84; R-A. R. 68-84), or with any finding of the Supreme Court of Tennessee, it is Respondents' contention that such findings

of both are actually conclusions of law which are subject to review by this Court. Where facts are established by admissions in defendant's answers below no citations to the records are given.

The Respondents Roane-Anderson and Carbide are cost-plus-fixed-fee contractors of the United States Atomic Energy Commission operating under Contracts W-7401-Eng-115 and W-7405-Eng-26 at Oak Ridge, Tennessee. The Respondents Wilson-Weesner-Wilkinson Company and Diamond Coal Mining Company are commercial firms which sold items of personal property to the Respondents Roane-Anderson and Carbide for use by the latter in the performance of their contracts with the Atomic Energy Commission.

The Respondent Carbide on November 23, 1943, entered into a contract with the United States of America, as an incident to the prosecution of World War II then in progress, and designated by the parties thereto as Contract W-7405-Eng-26. That contract and the amendments thereto through August 29, 1949, are Exhibits 1, 2, 19, and 27-36, inclusive, herein.* The scope of work contemplated under said contract was important at that time and remains important at this time in relation to matters of extremely grave concern to the national welfare, security and defense. The Respondent Carbide promptly entered upon the performance of said contract, has been engaged therein ever since, and is so engaged at the present time.

The Respondent Roane-Anderson Company, a subsidiary of the Turner Construction Company organized specifically for this purpose, on February 14, 1944, entered into a

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* Since the filing of this suit the Carbide and Carbon Chemicals Corporation was merged with the Union Carbide and Carbon Corporation, and the latter has been substituted as the contracting party with the Government *ab initio* with respect to both the rights and obligations of the former under Contract W-7405-Eng-26. The contract operation is now carried on by the Carbide and Carbon Chemicals Company, a Division of Union Carbide and Carbon Corporation.

contract with the United States of America, as an incident to the prosecution of World War II then in progress, and designated by the parties thereto as Contract W-7401-Eng-115. That contract, and amendments thereto through June 23, 1949, are Exhibits 1, 2, 27, 30-35, inclusive, herein. The scope of the work contemplated under said contract was important at that time and remains important at this time, in relation to matters of extremely grave concern to the national welfare, security and defense. The Respondent Roane-Anderson promptly entered upon performance of said contract, and has been engaged therein ever since, and is so engaged at the present time.*

The Act of Congress of August 1, 1946. (Public Law 585—79th Congress, 42 USCA 1801, et seq.), known as the Atomic Energy Act of 1946, provides for the transfer of all properties, responsibilities, duties, rights, etc., from the Government's agency which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which the Respondents Roane-Anderson and Carbide then and now maintain their offices and carry on their work under said contracts.

The Governmental agency through which said work had been carried on until the transfer to the Atomic Energy Commission was known as the Manhattan Engineer District of the United States Army Corps of Engineers. Acting pursuant to and in accordance with the provisions of said Act, the President of the United States issued Executive Order No. 9816, dated December 31, 1946, which

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* The Roane-Anderson Company has given notice of termination under its contract, and by agreement between this Respondent and the Atomic Energy Commission the Roane-Anderson Company contract is being terminated, effective November 30, 1951. Counsel for the Respondents has been advised by representatives of the Commission that the work heretofore carried on by Roane-Anderson will be performed under a similar type contract with a group of Oak Ridge citizens, incorporated as Management Services, Inc.

transferred to and made the aforementioned contracts, contracts between the Atomic Energy Commission, an agency of the United States of America, and the Respondents Carbide and Roane-Anderson as of midnight December 31, 1946.

As a necessary and integral part of the work under, and in the course of action required by said contracts, the Respondents Carbide and Roane-Anderson have purchased property of the kind described as being taxable under the Tennessee Retailer's Sales Tax Act of 1947, and will continue to purchase such property in the performance of their contracts.

The Respondent Carbide has paid Tenessee sales and use taxes on the purchases of property for use under its contract with the Commission and described as being taxable under said statute.

The Respondent Roane-Anderson has paid Tennessee sales and use taxes on the purchases of property for use under its contract with the Commission and described as being taxable under said statute.

All of the procurements of property by Carbide and Roane-Anderson asserted to be taxable by the Petitioner under said Tennessee sales tax statute were purchased solely for use under their contracts with the Commission, and were obtained under, and handled through, the same procedures and arrangements as the purchases by each of said Respondents described in the testimony and the exhibits attached. (Carb. R. 174-218, R-A R. 176-220). The Carbide procedures and forms are shown by Exhibits 3 through 12, and 13 through 18. The Roane-Anderson procedures and forms are shown by Exhibits 4 through 17, and 18 through 26.

As the legality of the tax collections here under consideration involve the legal status of Carbide and Roane-Anderson under their contracts with the United States Government, those contracts, as well as the Respondents' operations, will be summarized

Carbide & Carbon Chemicals Corporation:

By Contract W-7405-Eng-26, as amended from time to time, Carbide contracted with the Government to carry on certain research and experimental work, to provide consultant services, to train personnel to operate certain Government-owned plants, and to operate for the Government said Government-owned plants then being constructed for the production of U-235, or otherwise related to the Atomic Energy program of the Government in Oak Ridge, Tennessee. This was a cost-plus-a-fixed-fee contract.

As of July 1, 1947, and continuously from that date, Carbide has operated for the Commission in Oak Ridge all of the Government-owned plants and facilities for the production of fissionable materials; namely the K-25 plant, and the Y-12 plant. (Carb. R. 167, 126-127). Since March 1, 1948, Carbide has also operated the Oak Ridge National Laboratory. (Carb. R. 126). The scope of the work carried on in these plants, while not subject to disclosure in detail for security reasons, may be stated generally as encompassing the production of fissionable material for use in military weapons, and the production of radioactive materials for use in peace time applications of atomic energy in the fields of biology and medicine, for industrial uses, and for many types of research (Carb. R. 119, 136, 141-143, 167, Carbide contract). Carbide also carries on in the plants an extensive program of research and development in various phases of the atomic energy field as directed by the Commission (Carb. R. 142-143, 167, Carbide contract).

The contract under which these operations are carried on may be described as a management contract whereby Carbide provides the personnel and certain technical experience, and the Government provides the facilities, and the money, and formulates the policies and programs to be carried out. (Carb. R. 141-144, 146-152, 173, 191, 195-205, 214-218, 220-227, and Carbide contract). The actual plant operations are carried on under the control of employees of

Carbide subject to and in accordance with policies and instructions of the Government (Exhibit 1, Article V-A, D, E, F, G, I, Carb. R. 228-234). Carbide owns none of the real or personal property making up the plants or used in the operation of the plants. (Carb. R. 133-136, 174, 194, 241-242).

The contract provides that in the operation of the plants, Carbide shall do all things necessary or convenient "in and about the operation and closing down" of the plants (Exhibit 1, Article V-A, p. 4). Although the basic facilities are provided by the Government, and the supply of uranium and certain other materials are furnished from time to time by the Government, operation of these plants includes the securing or purchasing of labor, tools, machinery, equipment, supplies, and services needed in connection with the plants.

By this contract the Government agreed to pay Carbide its cost of the work plus a fixed-fee based on the estimated cost at the time the contract was entered into (Exhibit 1, Article V, and VI). The fixed-fee is subject to increase or decrease owing to such changes as the Government might require in the contract, but is not subject to any adjustment in case the actual costs vary from the estimated cost. The contract expressly provides that all the work is to be at the expense of the Government; that the Government shall hold Carbide harmless against any loss or damage occurring unless due to wilful misconduct or bad faith of the Company's officers (Exhibit 1, Article VIII-A, Supplement 19); and that Carbide is under no obligation to use any of its own funds in the performance of the contract (Exhibit 1, Article VI-D). Carbide has not used any of its own funds in the performance of this contract (Carb. R. 173), and all of the costs thereof have been paid from monies advanced by the Government for that purpose (Exhibit 1, Article VI-C), or from revenues received by Carbide for the Government's account and used in reducing the cost of the work (Exhibit 1, Article V, Section 5, and Article IX).

Title to purchased materials for which Carbide is entitled to reimbursement vest in the Government directly from the vendors, the Government and Carbide having consistently dispensed with the formalities originally mentioned in the contract (Exhibit 1, Article VIII-4, Section 4, Supplement 8), the provisions for which were really created to cover Government procurements handled in ways different from those at Oak Ridge.

Article VIII-D, Section 3, of Exhibit 1 provides that Carbide shall make all purchases in its own name and not bind or purport to bind the Government, and that all purchases in excess of $2,000.00 will be approved by the Government before being made.

The contract further provides that salaries and expenses of Carbide employees to be reimbursable under the contract, must be approved by the Government, and certain key personnel may not be employed without prior approval of the Government (Exhibit 1, Article VI-A, Exhibit 19, and Carb. R. 218-227). The Government may require Carbide to dismiss from the contract work any employee whom the Government deems to be incompetent, careless, insubordinate, or whose continued employment is considered inimical to the public interest (Exhibit 1, Article VIII-D). All labor disputes, or threatened disputes, must be brought to the attention of the Government (Exhibit 1, Article VIII-N). All patentable discoveries made by Carbide or its employees in the performance of the contract must be reported to the Government, which will determine whether same will be patented, and the disposition of title to and any rights under any patent which may result (Exhibit 1, Article VIII-R). All technical data, notes, drawings, designs, and specifications prepared by Carbide in the performance of the contract become the property of the Government, and will be delivered over to the Government whenever requested (Exhibit 1, Article VIII-Y). The contract provides for the payment of employee benefits for death or injury due to certain hazards peculiar to the atomic energy program, when approved by the Government (Exhibit 1, Article VIII-BB, Supplement 22).

The raw material for use in these Government-owned plants is procured and furnished by the Government, and its use carefully and systematically controlled and accounted for under the direction and supervision of the Government (Carb. R. 157-158, 228-235, and Exhibit 20). Certain other types of property, utilities, and services are furnished to the plants by the Government without charge to the contractor (Carb. R. 228-235).

METHOD OF REIMBURSING COSTS. As provided in Article VI-C, Exhibit 1, the Government has advanced to Carbide from time to time sufficient monies with which to pay all of the costs incurred by Carbide in the performance of the contract. (Carb. R. 173, 188). The payment of Carbide's fee has not been made as a part of or from these advances, but is paid directly to Carbide by the Government. The advance of money originally made by the Government was placed in a special bank account upon which Carbide could draw to meet its costs. In order that a specified balance would always be on hand in this account, a procedure was followed whereby Carbide would pay for the materials, etc., going into the operations from this account, and in turn submit a voucher on the Government showing how much had been spent. The Government then reimbursed Carbide by a like amount, which was in turn deposited to the Special bank account. (Carb. R. 188). For a description of the reimbursement procedure reference is made to the Exhibits filed with the depositions in this case for the purchase of a Braun pulverizer from the Fisher Scientific Company. (Carb. R. 173-188). Carbide prepared and placed the purchase order with the vendor (Exhibit 7). The vendor shipped the item ordered and invoiced Carbide (Exhibit 8). On receipt the equipment was checked and a receiving report prepared by an employee of Carbide and approved by a representative of the Government (Exhibit 9). Carbide then paid the vendor by check drawn on the Hamilton National Bank of Knoxville against Carbide's "contract account" (Exhibit 1f), and submitted a voucher

against the Government (Exhibit 12). When the amount shown on the voucher was paid to Carbide, that sum was then deposited in the "contract account" and used for subsequent purchases.

THE SPECIAL BANK ACCOUNT. The terms and conditions of the advances authorized by the contract are covered in Article VI-C, Exhibits 1 and 31. In brief this article states that the Government may advance to Carbide sums (originally not to exceed 50% of the estimated contract work), without interest, for use as a revolving fund in carrying on the contract work. Until all such advances are liquidated, all sums received by Carbide, together with all funds received as reimbursements for contract costs and other revenues received under the contract are to be deposited in a member bank of the Federal Reserve System, or in an insured bank within the meaning of 12 USCA 264, and be maintained separate and distinct from Carbide's own funds. The contract requires that such funds will be so designated to indicate clearly to the bank their special character and purpose, and restricts the use of the funds to carrying out the contract between Carbide and the Government.

This provision of the contract originally provided that the balances on hand in the special accounts should secure the repayment of the advances, and that the Government would have a lien upon such balances to secure the repayment, which lien would be superior to any lien of the bank or any other person. By Modification No. 24 to the contract (Exhibit 31) Article VI-C of the contract was amended, effective October 1, 1948, in connection with the establishment of an integrated cost accounting system for use by the Commission's cost-type contractors. In general the changes to Article VI-C affirmed the intent of the parties that Carbide was not required to use its own funds in carrying out the contract work, expressly stated that title to the funds in the special accounts remained in the Government until expended, and provided that the amounts of Govern-

ment funds to be advanced for the contract work would be mutually agreed upon.

Checks may be drawn on these special accounts by the Contractor, but upon notice by the Government to the bank, the contract provides that Carbide shall have no right to make further withdrawals. The Bank is required to act upon such notice and shall be under no liability to any party to the contract for any action taken in accordance with such notice.

On completion or termination of the contract for other than the fault of the contractor, the unliquidated balance of such advances shall be deducted from any payments otherwise due Carbide, and the excess of the unliquidated balance is to be returned to the Government. If the contract is terminated because of the fault of Carbide, the entire unliquidated balance of the advance must be returned to the Government without set-off.

Originally the contract provided that at any time during the performance of the contract, if the Government determined the amount in advance was in excess of Carbide's current needs under the contract, it could direct Carbide to return the determined excess to the Government. By Modification 24 the procedure by which a determination may be made that an excess of funds needed to carry on the work actually existed requires mutual agreement between the parties, or, in the event of disagreement, a finding under the disputes provision of the contract.

By Modification No. 24 (Exhibit 32) Article VI-C was amended to provide, effective October 1, 1948, as follows:

> "1. It is the intent of the parties that the Contractor shall not be required to utilize its own funds in making expenditures reimbursable under this contract. Accordingly, the Government shall advance to the Contractor, from time to time (generally monthly, but in any event at such times, more or less frequently than once each month, as in the opinion of the Commission the Contractor's need therefor develops), such Gov-

ernment funds (hereinafter referred to as "advances") as the parties mutually agree upon in writing as adequate to enable the Contractor to continue to make reimbursable expenditures under this contract in furtherance of its performance thereof; any failure so to agree shall be deemed to be within the purview, and shall be resolved in accordance with the provisions, of Article VIII-F. It is understood that such advances are not loans to the Contractor and will not require interest payments by the Contractor, and that the Contractor will acquire no right, title or interest in or to such advances other than the right to make expenditures therefrom for the purposes authorized in, and within the intent of, this contract.

"2. Until all such advances are liquidated, all funds received as reimbursement shall, together with all such advances, be deposited in a special bank account or accounts (hereinafter referred to as "special accounts") at a member bank or banks of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (Act of August 23, 1935, 49 Stat. 684) as amended (12 U.S.C. 264), separate from the Contractor's general or other funds; special accounts shall be so designated as to indicate clearly to the bank their special character and purpose; and balances in special accounts shall be used by the Contractor exclusively for the purpose of making reimbursable expenditures under this contract (including such amounts, considered reasonable by the Commission, as are expended by the Contractor in furtherance of the provisions of this Article).

"3. In the event either party is of the opinion, at any time or times, and notifies the other party in writing, that the then balance of such advances is in excess of the Contractor's need, the amount of alleged excess

shall be promptly returned or credited to the Government in such manner as the Commission directs; however, if such opinion is not concurred in by the other party, the matter shall be deemed to be within the purview, and shall be resolved in accordance with the provisions, of Article VIII-F, and such portion of the amount of alleged excess as is involved in the dispute shall not be so returned or credited pending the outcome of the dispute.

"4. All funds advanced and all funds deposited in special accounts shall remain the property of the Government until expended or returned. The Government's title to such funds shall be superior to any claim or lien of the bank or any other party upon special accounts irrespective of the basis of such latter lien, provided, however, that the bank shall be under no liability to any party hereto for the withdrawal of any funds from special accounts through checks properly indorsed and signed by the Contractor, except that after the receipt by the bank of written directions from the United States Atomic Energy Commission the bank shall act thereon and be under no liability to any party hereto for any actions taken in accordance with such written directions. Any written directions received by the bank in due course, upon United States Atomic Energy Commission stationery, and purportedly signed by or at the direction of said Commission, shall, insofar as the rights, duties and liabilities of the bank are concerned, be conclusively deemed to have been properly issued and filed with the bank by said Commission.

"5. If, upon expiration of this contract, or upon its termination for other than the fault of the Contractor, such advances have not been fully liquidated, the unliquidated balance thereof shall be deducted from any payments otherwise due the Contractor, and if the sum or sums due the Contractor are insufficient to cover

such balance, the excess shall be returned by the Contractor forthwith after demand and final audit by the Government of all accounts hereunder; provided, however, that in the event of such termination of the contract for other than the fault of the Contractor, such deduction shall not be made prior to final audit unless (and only to the extent that) the Commission determines that such action is reasonably required in order to secure the return to the Government of such unliquidated amounts of the advance monies. In the event of termination of this contract because of the fault of the Contractor, the Contractor shall return to the Government, upon demand, without set-off of any sums alleged to be due the Contractor, the unliquidated balance of such advances.

"6. The Contractor shall at all reasonable times afford the Commission proper facilities for the inspection and audit of special accounts, and the Contractor's papers and data relevant thereto, and the Commission shall have the right (to the extent of the Contractor's rights), during business hours, to inspect and make copies of any entries in the books and records of the pertinent bank or banks, pertaining to special accounts.

"7. Subject to the prior written approval of the Commission, the Contractor may make advances of Government funds out of special accounts to subcontractors and materialmen, upon such terms and conditions as the Commission approves in writing."

PROCUREMENT OF PROPERTY. In operating these wholly-owned Government plants Carbide purchases a large volume of personal property, both in Tennessee and outside the state, for use in the plants or for the activities it carries on for the Commission. The requests for procurements, such as those involved in these cases and shown as Exhibits 3 through 12, and 13 through 18, originate with

employees of the Company directly in charge of specific phases of operations. (Carb. R. 175). Orders for requested materials or supplies are placed by Carbide through a standard purchase order form (Exhibit 7), and when for more than an amount specified in the contract, must be approved by a representative of the Government. The contract originally required approval for purchases over $2,000 (Exhibit 1, Article VIII-D), but now requires this approval only for purchases in excess of $100,000. (Exhibit 31, p. 6). When property purchased is received at the warehouse, employees of Carbide inspect and accept the merchandise. (Carb. R. 209-218). Until October 1948 the Government also made spot checks of materials being received—in which event a Government inspection sheet was prepared, and the Government and Carbide inspectors countersigned the two reports. (Carb. R. 186, 211, 216). Under present procedures no spot check inspections are made by the Government, although the Government does inspect and approve Carbide's methods and organization for receiving and checking incoming materials. (Carb. R. 151-157, 186, 210, 216). On acceptance of the materials by Carbide, an appropriate marking is placed, burned or stamped on the material (if of such a nature that it can be marked) to indicate that it is the property of the Government. The symbol used for this purpose by Carbide is the letters "USC & CCC", followed by a number and a prefix letter to show the plant for which the property is intended. (Carb. R. 135, 185-186, 197). The symbol and number placed on the property is assigned at the time the purchase order is prepared, and is affixed on the property at the time of inspection in the warehouse. (Carb. R. 205-206, 211). This marking of property was a requirement of the Army prior to the taking over of these plants by the Commission, and was continued thereafter by the Commission for the purpose of identifying the Government's property (Carb. R. 134). Carbide prepares and maintains stock record cards (Exhibit 10) on property so received,

and such cards are the records of the Government and the sole property record maintained of materials purchased and used for the contract work. (Carb. R. 179-180, 201-202). Carbide carries no insurance on the property it purchases, either while in transit or after receipt. (Carb. R. 187).

The Carbide contract, prior to Modification No. 24, provided:

> "Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under Article VI-A shall vest in the Government at such point or points as the Contracting Officer may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time." (Exhibit 1, Article VIII-A, par. 4, Supp. 8).

This provision of the Carbide contract, as stated with regard to the Roane-Anderson contract, is standard form language used in many types of Government contracts, and its primary use was in situations where the property being procured had to pass through several contractors before delivery to the Government. (Carb. R. 132-135, ~~147~~). In the performance of this contract no point has been designated by the Government as the point at which title would pass (Carb. R. 134-135, 185), nor have any written acceptances of such property been made (Carb. R. 192), other than the counter signature by a Government representative on the receiving reports prepared by Carbide (Carb. R. 148-149). As in the case of Roane-Anderson all such receiving reports were countersigned though the property referred to therein was not manually inspected.

Since Modification No. 24, this provision of the Carbide contract has read:

"Title to all property (including, but not limited to, materials, tools, machinery, apparatus, equipment, supplies, and products) acquired by the Contractor under this contract and for which it is entitled to reimbursement under this contract shall pass directly from the vendor or supplier to the Government at the point of delivery thereof or at such other point or points as the Commission may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Commission; and provided, further, that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time."

Article VIII-D, par. 3 of the Carbide contract requires that the Company place contracts for the purchase of materials in its own name, and not bind, or purport to bind, the Government. Carbide has included in all of its purchase orders a statement to this effect (Exhibit 7). Carbide's own obligation with respect to such procurement is stated on these purchase orders as follows:

"Carbide & Carbon Chemicals Corporation's only liability hereunder shall be to pay for materials or services ordered hereunder out of funds supplied by the United States Government under Contract W-7405-Eng-26, which has agreed under such contract to supply such funds."

Upon receipt and acceptance of property purchased, Carbide's receiving warehouse delivers the property to the operating division or office of Carbide initiating the original request, or stockpiles the property for general use. Purchases of such items as coal are delivered directly to the coalyard, and thereafter used or consumed in the operation of the plants. At no time after passing through the receiving warehouse is such property inspected by the

Government. (Carb. R. 186). As stated in the testimony, it was the intent of the Government and Carbide that title to all such property should pass directly from the vendor to the Government, and in fact it was the practice of the Government and Carbide to treat title to such property as having passed directly from the vendor to the Government. (Carb. R. 133-136, 174, 193, 197-198).

All of Carbide's procurements were originally shipped on or converted to Government Bills of Lading (Carb. R. 150, 236-241). While this practice has been discontinued, no changes have been made in the Carbide procurement forms and procedures followed in purchasing materials for these Government-owned plants. The purchases of coal by Carbide from the Diamond Coal Mining Company, shown as Exhibit 14, were converted from a commercial Bill of Lading to a Government Bill of Lading, and the cost of transportation paid by the Government to the carrier (Exhibit 22, 23, 24, 25).

Roane-Anderson:

By Contract W-7401-Eng-115, as amended from time to time, Roane-Anderson contracted to "manage, operate, and/or maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to, Government-owned facilities, utilities, roads, services, properties, and appurtenances, as directed or authorized" by the Government. (Exhibit 1, Article 1). This contract was a cost-plus-a-fixed-fee contract.

The town of Oak Ridge was built for the sole purpose of housing workers necessary for the construction and operation of the Government's plants at Oak Ridge (R-A R. 118, 122). The Government acquired by purchase or condemnation all of the land, some 59,000 acres, on which the city and the plants were built, although it did not take exclusive jurisdiction thereof. It is stipulated by the parties that all the buildings on the land comprising the area known as the

Clinton Engineer Works, including the town of Oak Ridge, were built for the Government and belong to the Government. (R-A R. 244).

Roane-Anderson was engaged by the Government primarily as the "town management" contractor and does no direct operations in connection with the Atomic Energy Commission plants in Oak Ridge. The Company has operated for the Government the town bus system, cafeterias, dormitories, and the hospital, all of which were Government-owned. The Company presently manages the Government-owned housing facilities in Oak Ridge, maintains the roads and streets, utility systems (electricity, water, sewerage disposal), and obtains concessionaires to operate businesses or commercial enterprises in Oak Ridge, using Government-owned facilities and on Government-owned property. (R-A R. 123-125, 166-168, 172). Under its contract Roane-Anderson provides these services, executes contracts, housing licenses and concessionaire agreements as agent for the Government (Exhibit 1, Article 1, Paragraph 3, R-A R. 168, 169, 172, 173, 183, 190, 202). Roane-Anderson owns none of the real or personal property which it operates or manages, or uses in the performance of its contract (R-A R. 168, 170).

Roane-Anderson also performs certain maintenance and repair services on other Government-owned buildings and properties, and carries on its payroll a number of employees designated as "mandatory employees", who perform municipal type services under the direction of employees of the Government; for example, policemen, and firemen. (R-A R. 124, 173-174). The supplies, materials and equipment needed for such organizations of "mandatory employees" are procured by Roane-Anderson and paid for in the same manner as all other purchases by the Company. (R-A R. 176, 184, 191-192).

All of the Company's activities under its contract are under the direct supervision of Government representatives (Exhibit 1, Article XVIII), and the manner and extent of

the various services and operations of the Company are subject to the direction and authorization of such representative (Exhibit 1, Article 1, Section 1, *et seq.*, R-A R. 140, 150-154, 166, 172, 223-227). The contract expressly provides that in the operation of the facilities under this contract, and in the procurement of any and all supplies, materials and equipment necessary to the performance of the work thereunder, the Company shall act as agent for the United States of America (Exhibit 1, Article 1, Paragraph 3, and Article VIII, Paragraph 3C). The Company has so acted at all times in purchasing the items of personal property asserted by the defendant to be taxable under the Tennessee sales tax law (R-A R. 168, 169, 183).

The Government agreed to pay Roane-Anderson its cost of the work plus a fixed-fee based on the estimated cost at the time the contract was entered into. By the terms of the contract the Government can increase or decrease the "management, operation, and maintenance services" called for in the contract without there being an adjustment in the fee payable to the Company (Exhibit 1, Article IV).

The contract provides that, subject to the approval of the Government, the Company shall prescribe the rates and charges to be paid by persons benefiting from or using Government property managed by the Company, that the Company will collect the revenues arising therefrom, and use such revenues to reduce the cost of the work under the contract (Exhibit 1, Article II, and Article V, Section V).

The contract also authorizes the Company to sell Government-owned property in its possession or transferred to it for disposal, and the proceeds of such sales paid in as the Contracting Officer shall direct. (Exhibit 1, Article 1, Section 2j).

Title to property furnished by the Government for use by the Company remains in the Government (Exhibit 1, Article V, Section 2b), and title to all materials purchased by Roane-Anderson, and for which it is entitled to reimbursement, vests in the Government directly from the

sellers, the Government and Roane-Anderson having consistently dispensed with the formalities originally mentioned in the contract (Exhibit 1, Article IX), the provisions for which were really created to cover Government procurements handled in ways different from those at Oak Ridge. By Modification No. 20 (Exhibit 32) Article IX was amended to provide, effective October 1, 1948, as follows:

> "Title to all property (including, but not limited to, materials, tools, machinery, apparatus, equipment, supplies and products) acquired or manufactured by the Contractor under this contract and for which the Contractor is entitled to reimbursement hereunder shall pass directly from the vendor or supplier to the Government at the point of delivery thereof or at such other point or points as the Commission may designate in writing; provided, that the right of final inspection and acceptance or rejection of said property at such place or places as it may designate in writing is reserved to the Commission; provided, further, that upon such final inspection the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection the Contractor shall be responsible for removal of the rejected property at Government expense within a reasonable time."

The contract requires that all property, title to which is vested in the Government, shall be suitably marked to indicate that such items are the property of the Government, and requires the Company to turn over to the Government at the expiration or termination of the contract, or upon demand of the Contracting Officer, all such "equipment, machinery, tools and unused materials and supplies to the place designated by the Contracting Officer." (Exhibit 1, Article V, Section 2b). The contract further provides that all legal matters arising in connection with the work shall be referred to the Government; that the Government will provide the necessary office space for the Company, and that it is the intent of the parties that the work is to be performed at the expense of the Government, and the Company shall not be

liable for any loss, damage, claim, or expense of any kind arising out of the performance of the contract, unless such expense results from the wilful misconduct of the Company's officers (Exhibit 1, Article XXVIII).

The salaries and expenses of the Company employees, to be reimbursed, must be approved by the Government (Exhibit 27, Exhibit 1, Article XXX, and Article V, Section 1); certain key personnel for the Company's organization cannot be employed without prior approval of the Government (Exhibit 1, Article V, Section 1e); the Government may require the Company to dismiss employees deemed by the Government to be incompetent, careless, or insubordinate or whose continued employment is deemed to be inimical to the public interest; all labor disputes, or threatened disputes, must be brought to the attention of the Government; and all contracts between the Company and unions representing its employees must be submitted to the Government for approval (Exhibit 1, Article XX) (R-A R. 221-230).

Method of Reimbursing Cost: As of May 31, 1947, Roane-Anderson had advanced for the purposes of this contract some $100,000.00, and Roane-Anderson at that time had on hand some $200,000.00 of Government money for use in connection with the contract work. (R-A R. 170, 171). The money advanced by Roane-Anderson was obtained from Company sources, and the Government money on hand represented revenues collected by Roane-Anderson on the Government's account and reimbursements made to Roane-Anderson by the Government. (R-A R. 173, 174). This money was on deposit in the Hamilton National Bank of Knoxville, Tennessee, in the name of Roane-Anderson. From this account the Company paid the salaries of its employees, the cost of materials procured for the work, and all other expenses under the contract. (R-A R. 171, 199-202). The fee payments by the Government to Roane-Anderson were not made from this money. (R-A R. 201, Exhibit I, Article II, Exhibit 30, Article VI).

Since the Government did not originally advance a sum of money with which to carry on the contract work, it was

necessary for the Company to establish a working fund for this purpose. (R-A R. 200). In addition, however, all of the revenues collected by Roane-Anderson for the Government from rentals of Government property, sales of Government property, and for other charges and income from the use of Government facilities were deposited by Roane-Anderson in the Hamilton National Bank, and thereafter used in paying obligations incurred under the contract. As the amount of revenue and income of these sources increased, Roane-Anderson was able to reduce the amount of its own funds necessary to pay for the contract work and since July 1, 1948 the Company has had none of its own money employed in its operations under the contract (R-A R. 170). This result, which was intended by the parties, was brought about by Roane-Anderson paying the contract costs out of the revenues received, and in turn billing the Government for the full amount of the expenditures which, when reimbursed to Roane-Anderson by the Government, were deposited to Roane-Anderson's account in the Hamilton National Bank. (R-A R. 200-201). At the present time Roane-Anderson operates entirely out of revenues it collects for the Government and advances of money by the Government to Roane-Anderson (R-A R. 171, 201).

For a description of the reimbursement procedure, reference is made to the exhibits filed with the depositions in this case for the purchase of a radio transmitter-receiver by Roane-Anderson from the Motorola Company.

PROCUREMENT OF PROPERTY: In the conduct of its work for the Commission, Roane-Anderson purchases annually a large volume of personal property, both in Tennessee and outside of the State, for use under its contract (R-A R. 170, 176). All procurements of such property by Roane-Anderson prior to December 1, 1947 were made on purchase order forms such as shown by Exhibits 6 and 7, as agent for the Government (R-A R. 184). From and after said December 1, 1947, such purchases have been made as agent for the Government on a purchase order form such as shown by Exhibit 8, and subject to the conditions stated

on the reverse thereof (R-A R. 184). The contract with the Government expressly provides that Roane-Anderson shall act as agent for the Government when procuring such property (Exhibit 1, Article I, par. 3, and Article VIII, par. 3(c)), and that any purchase orders over a specified amount must be forwarded to the Government for approval prior to placing with the vendor. Originally the contract required this approval for all purchases in excess of $2500 (Exhibit 1, Article VIII, par. 3(c)), but since Modification No. 20 requires prior Government approval only for purchases in excess of $10,000. (Exhibit 32, Article VIII, par. 3(c)).

Vendors are directed on the purchase orders to ship the property to the Atomic Energy Commission, Oak Ridge, Tennessee, care of Roane-Anderson Company (R-A R. 181, Exhibits 5 and 6). When property so purchased is received at the warehouse in Oak Ridge, employees of Roane-Anderson inspect and accept the purchased items (R-A R. 203). Until October 1948 the Government also made spot checks of materials being received by Roane-Anderson (R-A R. 206). On these spot checks the Government inspector would prepare an inspection sheet (Exhibit 13) in addition to the tally-in sheet prepared by Roane-Anderson Company (Exhibit 12). (R-A R. 205, 210, 218). Under the present procedures the Government does not inspect or make spot checks of incoming purchases, although it does review and approve Roane-Anderson's procedures and organization for inspection and accepting incoming items (R-A R. 206, 212, 219). On acceptance of the property by Roane-Anderson an appropriate marking is affixed to the property (if of such a nature that it can be marked) to indicate that it is property of the Government. The symbol used for this purpose by Roane-Anderson consists of the letters "USRA". (R-A R. 133, 204). Following receipt of the vendor's invoice (Exhibit 11), and preparation of a receiving, inspection, and acceptance report (Exhibit 14), which is countersigned by a representative of

the Government, Roane-Anderson pays the invoice (Exhibit 15) and submits a reimbursement voucher to the Government for the amount of its expenditures (Exhibit 17).

All of such property purchased by Roane-Anderson is used by the Company in the operation of the facilities carried on for the Government, or in the repair or alteration of Government-owned property, or by some of the "mandatory employees" on Roane-Anderson's payroll in the performance of municipal type functions (R-A R. 166, 167, 170).

The contract between Roane-Anderson and the Government, prior to Modification No. 20, provided (Exhibit 1, Article IX):

> "Title to all materials, tools, machinery, equipment, and supplies which the contractor purchases in accordance with Article I of this contract, and for which the contractor shall be entitled to reimbursement under Article V, shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment, and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further, that upon final inspection the contractor shall be given written notice of acceptance or rejection as the case may be."

This provision of the contract is standard form language used in many types of Government contracts, and reserves to the Contracting Officer full control over when and where the Government would take title to property being procured for it. This language is primarily intended to cover situations where the Government was procuring property which had to pass through several contractors before delivery to the Government (R-A R. 131-132). Under this contract no point was designated by the Contracting Officer as the point at which title would pass (R-A R. 133, 187, 207, 209). Until the revision of the Roane-Anderson purchase order form (Exhibits 8-9) all orders carried the

statement that "this order is for the account of the United States Government and becomes property of the Government at the time it is shipped." Although this statement was removed from the purchase order form with the approval of the Contracting Officer, the effect thereof was merely to permit passage of title at the f.o.b. point specified in the purchase order. (R-A R. 180-182, 186).

It was and remains the intent of the Government and Roane-Anderson that the title to property purchased by Roane-Anderson vested in the Government at the moment title passed from the vendor, and all property purchased by Roane-Anderson has been so treated (R-A R. 133-135, 169, 172, 181, 183, 185-186). No written notices of acceptance by the Government of the materials purchased by Roane-Anderson were prepared and forwarded to Roane-Anderson, other than the inspection reports made on a spot check basis and the signing, by a representative of the Government, of the inspection and receiving reports prepared by Roane-Anderson (Exhibit 14, R-A R. 147-149; 209-214).

Procurements by Roane-Anderson originally were shipped on or converted to Government Bills of Lading (R-A R. 238-239). While this practice has been discontinued, no changes have been made in the procurement forms and procedure followed by Roane-Anderson in the procurement of supplies and equipment for use in the contract work.

* * * * * * * * * *

The contracts of Carbide and Roane-Anderson involved in these cases have been amended from time to time since their inception. At the time depositions were taken in these cases all of the contract modifications then executed were filed as exhibits. Between that time and the hearing of the cases before the Special Chancellor additional modifications to these contracts were executed by the Respondents and the Government. By stipulation between the parties (R-A R. 245-246) certain additional modifications to these contracts were filed as exhibits in the respective

cases. (In the Carbide cases this stipulation was inadvertently omitted from the printed record and we anticipate it will be supplied by agreement of the parties before the hearing.)

In general these modifications have dealt with changes in the scope and amount of work to be performed for the Commission, including changes in the amounts of money obligated under each contract. One of the modifications to the Carbide contract (Exhibit 31) adds new contract language and effects several changes in the methods of operation by eliminating the necessity of certain Government approvals theretofore required. This modification also revised Article VI-C pertaining to advances of funds and Article VIII-A pertaining to passage of title of property procured for the contract work. The article pertaining to advances of funds was included in the Roane-Anderson contract by Modification 19 (Exhibit 30).

Modification 20 (Exhibit 32) to the Roane-Anderson contract is a complete rewrite of the contract provisions and states the entire contract as it existed between Roane-Anderson and the Government effective October 1, 1948.

QUESTIONS PRESENTED BY THESE CASES

These cases present to the Court the questions whether the Tennessee Retailers' Sales Tax Act, being Chapter 3 of the Public Acts of the General Assembly for Tennessee for the year 1947, as amended, can be applied to purchases made by the Respondent contractors through whom the U. S. Atomic Energy Commission carries on a major part of its activities at Oak Ridge, Tennessee; and if so, to what extent.

The Tennessee Sales Tax Act purports to levy a tax on persons exercising the privilege of carrying on the business of selling tangible personal property in the State, and also on persons for the privilege of using, storing for use, or consumption of such property in the State. (Chapter 3, Public Acts of the General Assembly for Tennessee, 1947,

Section 3.) The Sales Tax part of the Act requires retailers to add the tax to the sales price of property subject to the tax and to collect the tax from purchasers. (Chapter 3, Public Acts, 194., Section 4.) By regulations promulgated by the Tennessee Commissioner of Finance and Taxation, an exemption is provided for sales of property covered by the Act made to the Government of the United States, its departments or agencies when the "sale of tangible personal property is made and billed directly to the Federal Government, its departments or agencies, and is paid for directly by the Federal Government" (Rule 58). The Supreme Court of Tennessee, in *Hooten* v. *Carson*, 186 Tenn. 282, 209 S.W. (2) 273, held that this Act levied a privilege tax upon vendors for the privilege of engaging in the business of making retail sales. More recently, however, that Court, in *Madison Suburban Utility District* v. *Carson* (June 9, 1950), 191 Tenn. 300, 232 S.W. (2) 277, held that both the *sales* tax and the *use* tax were inapplicable where the purchaser's revenue and property had been exempted from taxation, and stated "all tax measures when called in question in the courts should be determined by their practical operation and effect rather than by what they are named" (232 S.W. (2) at p. 280).

In the Tennessee Supreme Court the argument was made that the Respondent Contractors of the Atomic Energy Commission in these cases were exempt from the payment of both the Tennessee Sales and Use Tax by reason of the implied immunity of the Federal Government from state taxation or regulation under the Federal Constitution, and by reason of the tax immunity provision contained in section 9 (b) of the Atomic Energy Act. While the Tennessee Supreme Court held the Respondents' purchases were not subject to the Tennessee Sales and Use Tax statute based on section 9 (b) of the Atomic Energy Act, that Court also held that Respondents were "independent contractors" and not entitled to such an exemption under the doctrine of implied immunity of the Federal Government from state taxation or regulation. The Petitioner

has sought review of the Tennessee Supreme Court's interpretation of the Atomic Energy Act and its opinion and decision exempting the Respondents from the Tennessee tax.

The United States Government, as intervenor, argued for the meaning and interpretation of section 9 (b) of the Atomic Energy Act contended for by the Respondents before the Tennessee Supreme Court, and will brief and argue that ground for immunity before this Court. The contractor Respondents concur in the position and arguments made by the Government with respect to the Atomic Energy Act.

This memorandum is being filed in order to set out, at greater length, the facts and circumstances of the relationship between the Commission and Roane-Anderson and Carbide, so that the Court will have that information available in its consideration of the tax exemption clause of Section 9 (b)

DISCUSSION

The Close and Integral Relationship Between the Atomic Energy Commission and the Respondent Contractors

A. Background and Summary of the Atomic Energy Program

The Atomic Energy Commission, either directly or through various contractors, carries on a wide and extensive program for the Government in the field of atomic energy, including the production of materials for atomic weapons, and the production of radioactive materials for use in research and development activities relating to atomic energy. The plants and facilities of the Government engaged in this work are distributed throughout the United States, and are operated at present almost entirely by private business and educational organizations under contract with the Commission. This arrangement and method of carrying out the functions of the Atomic Energy

Act has been adopted by the Commission as the most desirable method for adequately and efficiently carrying out its work.

The Government's undertaking in this field is so gigantic and the circumstances involved so novel, that not only has it been necessary for the Government to enlist and retain the services of competent and skilled industrial and scientific organizations to build and operate its plants, but also to completely build and provide for the operation of three entirely new cities—Oak Ridge, Tennessee; Los Alamos, New Mexico, and Richland, Washington.

The principal contractor of the Commission in Oak Ridge for the operation of its plants there is the Carbide & Carbon Chemicals Corporation. The town management contractor for Oak Ridge is the Roane-Anderson Company. In addition to these contractors the Commission also engages a number of other cost-type contractors to perform many of the associate or sustaining services needed in the efficient operation of the Commission's programs and functions carried on in Oak Ridge. These include, for example, contractors to operate the town bus system, city hospital, and firms to plan and design plant, town, and related construction and development; as well as firms to carry on the construction of different plant projects. Certain phases of the Commission's programs for training and research are carried on by non-profit organizations under cost-type contracts with the Commission; for example, the Oak Ridge Institute of Nuclear Studies and the University of Tennessee. The operation of the Oak Ridge School System is carried out by a cost-type contract with the Anderson County Board of Education.

The Oak Ridge installations and facilities are entirely Government-owned, and the jurisdiction of the Commission over them is established by the Atomic Energy Act and the Executive Order which the President issued pursant to that Act. The production facilities at Oak Ridge are operated by Carbide, under a cost-plus-fixed-fee type operating con-

tract. Production activities are concentrated on the production of Uranium-235, fissionable material, and it will be recalled that by law the Commission is given a monopoly over the production of fissionable material. In one plant (K-25) operated by Carbide the Uranium-235 is separated from Uranium-238 by a process of gaseous diffusion; in another plant (Y-12) it can be separated by an electromagnetic process. Carbide now also operates the Oak Ridge National Laboratory (X-10), a Commission-owned laboratory for atomic energy research formerly operated by Monsanto Chemical Company, but which was transferred to Carbide operation effective March 1, 1948. In this laboratory research of fundamental importance to the production and use of fissionable material is carried on, and radioactive isotopes which are proving of enormous benefit to medical, biological, agricultural, and industrial research of all kinds, are produced and distributed.

The town of Oak Ridge is located on the Commission-owned site, and exists for the sole purpose of providing necessary community facilities and services to the multitude of persons employed by the Commission and its contractors at the Oak Ridge installation. Most of the necessary town management functions and services are carried out by Roane-Anderson Company, pursuant to its cost-plus-fixed-fee contract. Thus, Roane-Anderson not only furnishes normal municipal services, such as the operation of utilities, fire protection, garbage disposal, and maintenance of roads and streets, but also handles the Commission's landlord functions for the residential and commercial buildings in the community, and performs a host of other services necessary to the welfare of the employees at this atomic energy facility.

B. Relationship Between Respondent Contractors and Atomic Energy Commission.

Since this Court's decision in *Alabama* v. *King and Boozer*, 314 U. S. 1, holding that the cost-plus-fixed-fee contractors of the Government there involved were not exempt

from the payment of the Alabama sales tax, considerable emphasis has been placed in other cases on the identification of "cost-type" contractors performing work for the Government as "independent contractors," or as "agents or instrumentalities" of the Government. The Tennessee Supreme Court in considering the contract relationship between the Respondent contractors and the Commission ruled that the doctrine of *implied immunity* from state taxation had no application because the Respondents were "independent contractors." One of the Judges, in a concurring opinion also refuting that an immunity from the Tennessee sales tax existed in the absence of the express language of section 9 (b) of the Atomic Energy Act, characterized the Respondents as "independent contractors who have authority to act as *purchasing agents* for the Atomic Energy Commission * * *" (italics added) (Carb. R. 23).

The term "independent contractor" has been often defined and applied in determining relationships between persons, either to establish or disclaim a master-servant relation for purposes of workmens' compensation benefits or legal responsibility for negligent acts of another. When this descriptive term is applied to the Respondent contractors as indicative of their relationship to and with the Atomic Energy Commission, insofar as it is used to determine the applicability of or exemption from the Tennessee sales tax statute, there exists no general similarity between the usually accepted and understood definition of an "independent contractor" and the facts and legal relation of the Respondent contractors in this case to the Commission.

An analysis of the control exercised, contract terms, and working procedures between the Respondent contractors and the Commission clearly demonstrates that the existing relationship is not actually one of a truly "independent" contractor whatever may be the traditional and classic definition of the term "independent contractor".

ATOMIC ENERGY ACT.

The Atomic Energy Commission under the Atomic Energy Act is directed and authorized to carry on certain works and programs, and to provide for various related or necessary services. In connection with the carrying out of these functions the Congress, by statute, has imposed certain controls and requirements which must be exercised by the Commission in the conduct of the atomic energy program. In the field of operating Commission-owned facilities for the production of fissionable materials, section 4 of the Atomic Energy Act requires that every contract must contain provisions restricting the right of subcontracting the work, obligating the contractor to make such reports to the Commission as it may deem appropriate, requiring him to submit to frequent inspections, and obligating him to comply with all safety and security requirements of the Commission. Another section of the Atomic Energy Act is devoted entirely to the responsibilities of, and policies to be followed by, the Commission in the protection of "restricted data." Because of the military values inherent from atomic energy, many activities which might otherwise be carried on by private business are expressly prohibited under the Atomic Energy Act, except as they may be done for, or under arrangements with the Commission. Recognizing many possible benefits and hazards which might arise from the development of atomic energy, the Congress has specifically directed that semi-annual reports "concerning the activities of the Commission" should be made to the Congress. The overall policy with respect to the methods and arrangements by which the Commission's work and the development of atomic energy are to be carried on are generally stated in section 1 of the Act. These statutory controls and policy directives are applicable to the Respondents' work for the Commission, and constitute the source and requirement for some of the controls, restrictions, and supervision exercised by the Commission over the work of the Respondent contractors.

CONTRACT PROVISIONS AND FACTS. (References to the records are made in the statement of facts, pages 2-26).

Both of the Respondent contractors were engaged in the performance of their contracts with the Government long before the adoption of the Atomic Energy Act and the transfer of the atomic energy program to the Commission. The initial contracts, and the controls and supervision imposed thereunder, were executed by the Manhattan Engineer District, for the Government, at a time when great secrecy, uncertainty, and urgent need existed. Their operations constituted a part of an overall Government-directed, owned, and planned effort to develop and produce atomic weapons.

The relationship between the Commission and the Respondent contractors, as established by the contract provisions and the record, was and is a very special kind. Roane-Anderson was established for the sole purpose of carrying out its community management activities under contract with the Commission; and Carbide has set up a separate division to carry out its contract with the Commission. The contracts represent a long-term, continuing relationship between Government and industry. They do not contemplate the performance of particular narrowly-defined tasks for which the outlines are fully known in advance, but were entered into and have been performed with knowledge and understanding that operations are subject to continual revision, modification, and change, both in the light of technical development and as a result of the evolution of Commission policy.

The operational activities carried on by the Respondent contractors are integrated parts of programs for which the Commission is responsible. The nature and scope of these programs, and of the integral parts thereof, are subject to determinations by the Commission, usually after consultation of course with the contractors, and to continuing review and modification by the Commission in the light of changing circumstances and Congressional and Presidential decisions. The land, production plants, raw materials, equip-

ment, supplies, plans, designs, and records used in the operation of the facilities, as well as the products of the operation, belong to the Commission. Knowledge, techniques, inventions and discoveries gained from the work are subject to strict control by the Commission. The houses, buildings, and other properties used to provide housing and other needs and services to the employees engaged in the program at Oak Ridge are owned by the Commission. The work of the contractors is subject to close supervision at all stages and at all times by representatives of the Commission who have offices at the Oak Ridge site, and whose chief responsibilities center on the operations carried on by the Respondent contractors. These Commission representatives establish general policies for the activities of each contractor and for the coordination of their activities with other contractors, supervise and inspect their combined fields of work, review subcontracts and purchases for approval, and inspect and audit the records and accounts of the contractors, and cooperate with the contractors in the solution of the manifold problems connected with the operation of the atomic energy facilities and the town of Oak Ridge. The work must be carried on in accordance with safety and security regulations of the Commission, and those employees of the contractors who will have access to restricted data are investigated by the FBI and are subject to security clearance by the Commission. Key personnel of the contractors' organizations may be employed only with the approval of the Commission. The salaries of all of their employees are controlled by policies and standards approved by the Commission, and the Commission may direct the dismissal of such employees whom the Commission deems "incompetent, careless or insubordinate," or whose continued employment is deemed inimical to the public interest.

At the same time the Respondent contractors are not required to risk their own money in the operation of Commission facilities. The contracts provide that the Government will reimburse the contractors for the entire costs of the

work. The contracts relieve the contractors of pecuniary responsibility for property used in the work, and also contain rather broad provisions for holding the contractors harmless against losses suffered on account of or arising out of the work. The Carbide contract specifically provides that Carbide shall not be obligated to use any of its own funds in the performance of work under the contract, and further provides that, upon request of the contractor, the Government shall advance monies to be used for carrying out the purposes of the contract. Under this last provision Carbide has used only Government money for activities under its contract. Although Roane-Anderson originally used some of its own money in performing its contract, revenues which it collected from concessionaires and occupants of housing in Oak Ridge soon made up the greater part of funds used in the contract. Its contract provides that such monies collected should be used to reduce the cost of the work. Since October, 1948, Roane-Anderson has been receiving advances to carry on its work in the same manner as Carbide.

Except for the uranium production materials, most of the materials and supplies necessary to the operation of these Commission facilities are puchased by or through the contractors. By contract the Commission reserves the right to pay suppliers directly, but customarily permits payments to be made by the contractors, who are then reimbursed by the advancement of additional funds from the Government and the use of revenues from Commission properties. Although the contracts of both Carbide and Roane-Anderson originally provided that title to articles acquired under the contracts should pass to the Government at a point designated by the contracting officer, the evidence shows clearly that as a matter of practice title to such articles has never been considered to be in the contractors but has always been treated as having passed to the Government at the time title passed from the vendor. Modification No. 24 to the Carbide contract and Modification No. 20 to the Roane-Anderson contract revised the title articles

in each of these contracts to provide specifically that title to materials purchased for the contract work should pass directly from the vendor to the Government. While these changes affected the language of the contracts, they merely conformed the contract language in each case to the intent and existing practices of the parties and did not create new conditions with respect to passage of title. *Moreover, Article I, paragraph 3 and Article VIII, paragraph 3 (c) of the Roane-Anderson contract provide expressly that in the procurement of supplies necessary to the performance of work under the contract, Roane-Anderson should act as the agent of the Government, and all procurements by this Respondent have been made in this capacity.*

COMPARISON WITH SITUATION IN THE KING AND BOOZER CASE.

Although we do not urge, in this Court, that the decision below be sustained on the ground that the transactions here are entitled to an implied Constitutional immunity, it is appropriate to discuss the distinctions between these cases and the *King and Boozer* case. The situation in the *King and Boozer* case is similar to the relationship between the Respondent contractors and the Commission only in certain superficial respects.

In the *King and Boozer* case, as in these, the contractors who made the taxable purchases held cost-plus-fixed-fee contracts with the Government, under which the Government reserved the right to restrict or control the contractors in many respects, including the right to approve in advance purchases made by the contractors in excess of a certain amount. In that case, the contractors were not permitted to bind the credit of the Government in making purchases. In these cases, Article I, paragraph 3 and Article VIII, paragraph 3 (c) of the Roane-Anderson contract provide that Roane-Anderson should act as the agent of the Government in the procurement of supplies necessary to the performance of its contract, and the purchase order used by Carbide shows that that Company's credit is not pledged on any

purchase. In these cases, both of the Respondents purchase supplies from advances of Commission funds, or from revenues received from the rental or disposal of Commission property or from services rendered to third parties as a part of the Respondent's contract work.

In the *King and Boozer* case the Government, by its contract, was buying a particular job of construction. The relationship contemplated by the contract, perhaps, was no different than that between any agency, private or public, and a contractor bound to do a particular and delineable job of an ordinary character—in the *King and Boozer* case the construction of an army camp. The relationship between the Commission and the Respondent contractors is vastly different, not only in its formal aspects but also in its purposes and practical effects. The contracts involved in these cases, as pointed out above, contemplate a long-term, continuing, and intimate relationship between the representatives of the contractor, of other contractors participating in various phases of the overall program, and those of the Government who are assigned to the task of operating Commission facilities and carrying out the Commission's program at the Oak Ridge site.

As has already been seen, the production aspects of this program—source materials, production facilities, by-product materials, and end product—are committed by statute to a Government monopoly, which the Congress placed under the jurisdiction of the Commission. The Respondent contractors, and others, are the principal means whereby the Commission carries on its activities at the major Commission installations pursuant to the Atomic Energy Act. These activities are vital to the common defense and security of the nation, and the functions performed by the Respondent contractors are essentially those of the Commission and governmental in character. Unlike the situation in the *King and Boozer* case, the Respondent contractors here are management contractors, who, in essence, supply the services of persons with executive, engineering and other knowledge and experience to assist in carrying

out parts of programs to the extent and in the manner directed by the Commission; and whose day to day operations constitute the activities which the Commission is directed and authorized to carry out.

The contracts and relationships here involved are not framed with reference to a particular and definable task as in the *King and Boozer* case, but are rather built squarely upon the everyday and unprecedented uncertainties and difficulties of the atomic energy program. As a result, the Commission relies heavily upon the scientific, technical, and management competence of its contractors; and the Commission, on its side, bears the huge costs and risks involved in the program and assumes responsibility for policy direction. This cooperative and necessary relationship has evolved into a fabric of integrated activities and responsibilities between particular Commission contractors, and between them and the Commission, which is far removed from the Government's relationship with the contractors involved in the *King and Boozer* case. Insofar as the production facilities at Oak Ridge are concerned it should be remembered that they are but a few of many cogs which must mesh and function with plants and other facilities of the Commission in various parts of the country to accomplish the primary program of the Commission today. Viewed in this light the operations carried on by the Respondent Carbide, and by other contractors operating other Commission facilities, are but the integral parts of the overall Commission-directed, owned, and controlled enterprise for producing atomic weapons and carrying on the development of atomic energy on a national scale.

In considering the particular aspects of the relationship involved in the procurement of materials and supplies for the program, consideration must be given to more than the formal relations of written approvals, terms of purchase orders, and reimbursement orders. It must be borne in mind that materials, equipment and supplies essential to the operation of the production plants, the laboratories, and municipal facilities at Oak Ridge (other than uranium

materials), are in large part procured by the Respondent contractors. However, the Commission cooperates closely with the contractors in ascertaining the need for supplies and in formulating procurement programs; it advances funds necessary for procurement, and replenishes those funds by means of the formal machinery or reimbursement; it cooperates in establishing specifications, selecting vendors, inspecting materials, and planning the most efficient and suitable use for supplies in the operation of facilities; while Commission offices and facilities at other locations arrange for supplies of uranium materials processed in the great gaseous diffusion plants, and Commission offices and facilities elsewhere take the output from Oak Ridge.

It is clear that the formal terms of the relationship, the contractual provisions for reimbursement, approvals, passage of title, etc., are only a partial index of the relationship between the Commission and the Respondent contractors.

C. Respondents as "Management Contractors" for the Atomic Energy Commission.

The relationship of the Respondent contractors to the Commission, as described above and contrasted to the relationships involved in the *King and Boozer* case, is clearly something different in the overall from that existing between the Government and the contractors in that case or usually understood and intended when the term "independent contractor" is applied.

The relationship of the Respondents to the Commission in these cases can be most aptly described as that of "management contractors" for the Atomic Energy Commission, in that they carry out for the Commission, under and in accordance with such policies, supervision, and controls as may be established by the Commission, particular portions of the Commission's programs and activities. Indeed, the Senate Report on S. 1717 (McMahon bill, which became the Atomic Energy Act), in commenting on section 4.(c) of the Act said:

"Wherever possible the Committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus, the bill permits *management contracts* for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry." (S. Report No. 1211, 79th Congress) (italics added).

While this section of the Atomic Energy Act specifically relates only to production activities, it is to be recognized that both of the Respondent contractors were actively engaged in carrying out their respective operations in connection with the atomic energy program prior to the passage of this Act, and the report referred to above was made after extensive hearings had been conducted covering the entire field of atomic energy, including past operations and recommendations for future methods of operation, control, and development. More recently, as regards the operation of the Commission-owned community facilities, the Congress has seen fit to limit expressly the amount to be paid as fees to contractors engaged in "community management"—again recognizing that the Commission-contractor relationship here was one of owner and manager (General Appropriation Act, 1951 (Pub. Law 759, 81st Congress, 2d Sess.,) Chapter VIII, Title I; Independent Offices Appropriation Act, 1952 (Pub. Law 137, 82d Congress, 1st Sess.), Title I).

Certainly the operation of an Atomic Energy Commission facility for the production of fissionable material is not Carbide's own business, for, by statute, only the Commission can own these facilities, and the operation of them is for the purpose of producing fissionable materials for the Commission. The contract with the Respondent Carbide and the facts clearly show that the Commission, and before it the Manhattan Engineer District, intended and has exercised considerable control over the operation of these plants. The Commission has not, and does not, permit these

facilities to be operated on a hands-off basis, looking only to the final result as the limit of its control over the operations. To a large extent, this Respondent's activities for the Commission also pertain to the conduct of research and development in these facilities in accordance with programs, policies, and instructions of the Commission. How could such functions be carried on otherwise when the policy control of what is done in the atomic energy program lies with the Commission?

The Respondent Roane-Anderson Company has been engaged in the management and operation of the Commission's real estate holdings in Oak Ridge, Tennessee, including the licensing of residential, dormitory, and commercial space in buildings, and the providing of most of the usual municipal-type services in this wholly-owned Commission town; all subject to the control, supervision, and direction of the Commission, and to such housing, municipal, and real estate policies as the Commission establishes.

Both of the Respondent contractors are paid a management fee for their services, while the primary objectives, costs, risks, and overall responsibility for the effectiveness and success of the program remain with the Commission. In such circumstances it is hard to visualize these Respondent contractors as anything but *managers* for the Commission in the conduct of this national enterprise. Certainly their relationship with the Commission defies the classic meaning and interpretation given the term "independent contractor." The need for, or occasion to exercise or require, controls or supervision over the managers, within policies established by the Commission, varies with changes in national policy, the exigencies of the overall program, the degrees of coordination required in various phases of the program, and other factors. The fact that the Commission may afford the managers more discretion or broader authority is evidence more of satisfaction and proof of performance, rather than of a conclusion that Respondents are truly independent, operating extensive Government

plants and properties, and spending large sums of Commission money, without control or supervision.

As "management contractors" the Respondents need not, for all purposes, be one and the same as "agents or instrumentalities" of the Government or the Commission, within a stereotyped meaning of this term. Obviously, they would not undertake regulatory functions of the Commission, for example; nor have all of the responsibilities and functions of the Commission; nor be subject to all of the limitations and restrictions of the Commission and its employees. As management contractors, however, operating facilities of the Commission utilizing funds of, or at the expense of, the Commission, and responsible to the Commission for the manner and performance of the work they have undertaken, it would appear they should not be so removed from the Commission as to be considered outside of the Commission's "activities." The operations carried on by the Respondent contractors are those of the Commission, for which it is responsible. The tax here involved is an attempt to tax the means by which the Commission is carrying on its functions; i.e., the "activities of the Commission."

In summary, the facts in these cases show clearly that Respondent Carbide uses advances of Commission funds or other Commission revenues with which to make procurements for the contract work, that title to property so purchased passes directly from the supplier to the Government and that Carbide's only obligation on such orders is to pay from the funds which the Government has agreed to supply for purposes of carrying on the work.

With respect to the Respondent Roane-Anderson its contract *expressly* directs the Respondent to make all purchases "in its name as agent for and on behalf of the United States," and all purchases for the contract work have been made in this capacity.

In addition all of such purchases by the Respondent Roane-Anderson are now made out of advances of Commis-

sion funds, or other Commission revenues (although this may not have been the case prior to 1947 in all instances), and title to the property purchased passes directly to the Government.

For these reasons, in addition to those contained in the brief filed on behalf of the United States, it is contended that purchases and use of property by both of the contractor Respondents are entitled to an exemption, under section 9 (b) of the Atomic Energy Act, from the Tennessee sales and use taxes.

Respectfully submitted,

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